90-625

No. 90-_____

In the Supreme Court of the United States

OCTOBER TERM, 1990

DANIEL HOY, DOUGLAS COUNTY, AND DOUGLAS COUNTY SHERIFF'S OFFICE,

Petitioners,

V.

ROBERT REED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Was petitioner Douglas County entitled to an affirmance of the judgment entered in its favor on the grounds that its evidence of a significant amount of training entitled it to a directed verdict on plaintiff's claim of inadequate training, because such evidence, as a matter of law, precluded a finding of deliberate indifference or gross negligence.

2. Is *Graham v. Conner*, 109 S. Ct. 1865 (1989), to be applied retroactively to an excessive force case, when a plaintiff did not assert a claim for recovery based upon the Fourth Amendment in his pleadings or pretrial order, at trial, or on appeal, at a time when such a basis for recovery had been recognized by this Court and the Court of Appeals for the Ninth Circuit; and when the plaintiff expressly relied solely upon the due process clauses of the Fifth and Fourteenth Amendments as his basis for recovery.

3. Does a seizure occur within the meaning of the Fourth Amendment, when a police officer shoots a person, not to effect an arrest or take custody of the person; but rather in self defense, in order to stop the person from killing him.

4. Assuming that a Fourth Amendment seizure did occur in the case at bar, does *Graham v. Conner*, 109 S. Ct. 1865 (1989), preclude a substantive due process claim as a basis for recovery, or can a substantive due process claim be an alternative basis for recovery in pre-arrest excessive force cases.

5. Assuming the retroactive application of *Graham v. Conner*, 109 S. Ct. 1865 (1989), was proper in the case at bar, were petitioners nevertheless entitled to an affirmance of

the judgment for the reason that as a matter of law, the record before the court proved that Deputy Hoy acted in an objectively reasonable manner under the circumstances facing him at the time he shot Mr. Reed.

6. Can a United States Court of Appeals reverse a jury verdict and remand a case for trial on a legal theory not raised or asserted at trial or on appeal, when such legal theory had been recognized by this Court and the Court of Appeals prior to the time of the lodging of the pretrial order and trial.

7. Can a United States Court of Appeals reverse a jury verdict and remand a case for trial on an issue not asserted or assigned as an error by an appellant in his brief on appeal.

8. When a United States Court of Appeals reverses a jury verdict on a legal theory not raised or asserted at trial or on appeal, must the Court of Appeals also consider the defense of qualified immunity on the record before it, when that defense is rendered applicable by reason of the legal theory applied by the Court of Appeals in reversing the case; and if so, was Deputy Hoy entitled to an affirmance of the judgment on his defense of qualified immunity.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Daniel Hoy, Douglas County, and Douglas County Sheriff's Department, respectfully prays that the Court issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Ninth Circuit in the above-entitled case.

OPINIONS BELOW

The initial opinion of the United States Court of Appeals for the Ninth Circuit in this matter is reported as *Reed v. Hoy*, 891 F.2d 1421 (9th Cir. 1989), and is set forth as Appendix A. In its opinion and ensuing judgment, the Court of Appeals reversed and remanded the judgment of the Untied States District Court for the District of Oregon, which had entered a judgment for petitioners (then defendants) based upon a jury verdict entered in favor of the petitioners.

The order amending the initial opinion and denying petitioners' petition for rehearing is set forth as Appendix B. The amended opinion is reported as *Reed v. Hoy*, 909 F.2d 324 (9th Cir. 1990). The unreported jury verdict and judgment entered on that verdict are set forth as Appendices C and D, respectively.

JURISDICTION

Jurisdiction to review the Court of Appeals' judgment by writ of certiorari in this civil case is conferred upon this Court by 28 U.S.C. § 1254(1). The initial opinion of the United States Court of Appeals for the Ninth Circuit was filed on December 15, 1989, and the judgment sought to be reviewed was entered on the same date. The order of the United States Court of Appeals for the Ninth Circuit amending its opinion

and denying petitioners' petition for rehearing was filed on July 18, 1990.

This petition for a writ of certiorari is being filed within the 90-day period prescribed by 28 U.S.C. § 2101(c) and Rule 13 of the Court, as computed in accordance with Rule 30 of the Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved in this case are the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. The federal statute authorizing civil actions for the deprivation of civil rights is 42 U.S.C. § 1983.

The Fourth Amendment to the United States Constitution provides in relevant part:

> "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, ..."

The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> "[n]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be

> subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

1. Basis of Jurisdiction in the Lower Courts.

The basis for federal jurisdiction in the United States District Court for the District of Oregon over plaintiff's claims is 28 U.S.C. §§ 1331 and 1343(3). The basis for jurisdiction in the Court of Appeals for the Ninth Circuit is 28 U.S.C. §1291.

2. Summary of Material Facts.

On the afternoon of Saturday, August 18, 1984, the plaintiff, Robert Reed, who at that time stood 5' 9 1/2" tall and weighed 205 pounds, got into an argument with his wife. During the argument, Mr. Reed hit his wife with his hands on her shoulders and in the head, and hit her with a hammer in the back as she laid on her stomach. He then told his wife he was going to kill her.

Mr. Reed's fifteen year old daughter saw the incident, and heard Mr. Reed threaten to kill her mother. Because the daughter believed that Mr. Reed was in fact going to kill her mother, she went to a neighbor for help, and at that time, telephoned the Douglas County Sheriff's Department, and requested the aid of a deputy.

Douglas County Deputy Daniel Hoy was dispatched to Mr. Reed's residence to check on the welfare of Mrs. Reed. When Deputy Hoy arrived at Mr. Reed's house, he got out of

his patrol car, and made contact with Mr. Reed, who at that time was outside of the house, crouched down near a crawl hole to the house, with his back to Deputy Hoy.

Deputy Hoy told Mr. Reed that he was investigating a possible crime, and asked to see Mrs. Reed. Mr. Reed ("I was very angry") replied that his wife did not want to speak to Hoy, and he told Hoy to get the "hell" off of his property. Hoy then stated that he was investigating a possible family disturbance and indicated that he would leave as soon as he spoke to Mrs. Reed.

After a short verbal exchange, Mr. Reed picked up a 36" bamboo stick that was used to stake flowers, held it in his hand, and using profanity, "hollered" at Deputy Hoy to get off of his property. In response to Mr. Reed picking up the bamboo stick, Deputy Hoy drew his nightstick. Mr. Reed then asked, "What are you going to do, hit me?" Deputy Hoy responded, "Only if I have to."

Deputy Hoy then once again requested to see Mrs. Reed, and assured Mr. Reed that he would leave after making sure Mrs. Reed was all right. Mr. Reed then walked up onto the porch to the house, got rid of the stick, and picked up a splitting maul out of a bucket of water. Deputy Hoy, who at this time was on the grass of the front lawn, then radioed for assistance on his portable radio.

Mr. Reed then, with the splitting maul in his right hand, walked down the porch steps, and onto the lawn. As Mr. Reed stepped onto the lawn, he was 15 to 20 feet from Deputy Hoy. Mr. Reed then "hollered" at Deputy Hoy, using profanity, "to leave my property, get away, get off my land."

Mr. Reed then walks toward Deputy Hoy, and Deputy Hoy started retreating, by walking backwards away from Mr. Reed. As Deputy Hoy continued to walk backwards, he told Mr. Reed to put the maul down. Mr. Reed responded by stating, "No, get off my property."

Mr. Reed continued to walk steadily towards Deputy Hoy, and Deputy Hoy continued to walk steadily backwards, but Mr. Reed was closing the distance between the two. After telling Mr. Reed on two more occasions to put the maul down, and after Mr. Reed refused to put the maul down, but instead continued to walk towards him, Deputy Hoy drew his service revolver, and pointed it at Mr. Reed.

Mr. Reed continued to walk towards Deputy Hoy, and because Deputy Hoy was walking backward with his eyes on Mr. Reed, he could not see where he was going, or what was behind him. At this point, Mr. Reed was carrying the maul "down to his side carrying it in his right hand."

Deputy Hoy then, two more times, told Mr. Reed to "Put the maul down." Mr. Reed refused to put the maul down, and refused to stop walking towards Deputy Hoy. At this point, Deputy Hoy thought Mr. Reed was going to hit him with the maul.

When Mr. Reed had closed the "gap" to approximately 6 feet, Mr. Reed "grabbed" the maul with both of his hands, and started bringing it up. At that point, Deputy Hoy assumed Mr. Reed was going to kill him, so Deputy Hoy shot Mr. Reed in the chest. As to Deputy Hoy's intent at the time of the shooting, Deputy Hoy testified at trial as follows:

> "A. Killing never occurred to me. That's not the intent. The-- The idea of shooting a person is to stop the threat.
>
> Q. Are you trained to shoot at the largest mass the object presents?
> A. That's correct. If you tried to shoot at a finger it would be a lot easier to miss. The largest mass is a lot easier to hit."

After the shooting, at the hospital, Mr. Reed admitted "that he felt that what happened should have happened." After Mr. Reed was released from the hospital, he told Robert Benedict, a neighbor and friend of twelve years, that he would have used the maul on Deputy Hoy, if Hoy had not shot him. As testified by Mr. Benedict at trial:

> "A. At that time of our conversation he said that he had spoke with, I think, another--another officer or something, but he was telling me that he did have intentions of using the splitting maul and that it was probably a good thing that it happened the way it happened.
>
> Q. So he told you that he did have intentions of using the maul and that was probably a good thing that he had gotten shot?
> A. Yes, something to that effect."

At trial, Mr. Reed never denied making the above statement to Mr. Benedict.

Prior to the incident, Deputy Hoy had received 671 hours of training in all areas of law enforcement, not including his training in the use of deadly force. He also had attended the the Police Academy, in Monmouth, Oregon. The course at the Police Academy lasted seven weeks, and was conducted five days a week, eight hours a day; and included firearms

training. The academy was "run" by State of Oregon's Board on Police Standards and Training.

Deputy Hoy received his "Basic" certification from the Board on Police Standards and Training as a corrections officer on April 1, 1977, and received his "Basic" certification from the Board as a police officer on May 1, 1979. He received his "Intermediate" certification from the Board on Police Standards and Training as a police officer on July 22, 1983. (exhibit 101 at 18)

At the time of the shooting, Deputy Hoy was a certified firearm's instructor for Douglas County, having been certified on July 21, 1981 (exhibit 101 at 4); and had read and understood the Douglas County Sheriff's Department's firearm policy, a five page written document that was received into evidence at trial as defendants' exhibit 102.

At trial, Deputy Hoy's field training manual was received into evidence as plaintiff's exhibit 1, and Douglas County's records of training provided to Deputy Hoy on the use of firearms and the use of deadly force were received into evidence as defendants' exhibit 101.

A reading of Exhibit of 101 shows as follows. Deputy Hoy read and understood Douglas County's firearm policy on November 2, 1978 (exhibit 101 at 24). He received firearms training from Douglas County on the following dates: on November 14, 15, and 16, 1978, (exhibit 101 at 10, 24); on February 12, 1979 (exhibit 101 at 10); on April 10, 1979 (exhibit 101 at 10); on May 10, 1979; on September 11, 1979 (exhibit 101 at 10, 25); on February 25, 1981 (exhibit 101 at 10); on May 14, 1981 (exhibit 101 at 10); on July 21, 1981

(exhibit 101 at 10); on September 15, 1981 (exhibit 101 at 10); on February 9, 1982 (exhibit 101 at 10); and on August 25, 1983 (exhibit 101 at 14).

In May of 1982, Deputy Hoy received 40 hours of training on special weapons and tactics from Douglas County (exhibit 101 at 19); and on March 8, 1983, Douglas County provided 7 hours of training to Deputy Hoy on the subject of "night shoot and boobytraps."

On April 12, 1983, Douglas County provided 7 hours of training to Deputy Hoy on the subject of "stress shoot."

Within a year of the shooting, on September 15th and 16th, 1983, Douglas County sent Deputy Hoy to Portland, Oregon, to receive 14 hours of training by the National Law Enforcement Institute on several subjects, including the subject of "officer-involved shootings."

Finally, in November and December of 1983, Douglas County sent Deputy Hoy to San Francisco, California, for training in terrorism and officer's survival (exhibit 101 at 2), the program having been sponsored by the National Law Enforcement Institute.

3. Procedural History.

The plaintiff filed his complaint (set forth as Appendix E) on September 27, 1985, against Deputy Hoy and Douglas County, alleging that Deputy Hoy's shooting of him denied him of his "liberty without due process of law as guaranteed by the Fifth and Fourteenth Amendments" to the United States Constitution. (App-26) Plaintiff sought general and punitive damages.

In February 1987, an amended complaint (set forth as Appendix F) was filed. The amended complaint again alleged that Deputy Hoy violated "his [plaintiff's] right not to be deprived of liberty without due process of the law as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution." (App-30)

The amended complaint also added an additional claim for relief against Douglas County, alleging that Douglas County "instituted either a custom or a policy by which they did not provide Sheriff's deputys with adequate training in the use of deadly force;" and "Douglas County failed to train Defendant Hoy in the constitutional use of deadly force." (App-32)

On March 19, 1987, the parties lodged their pretrial order (set forth as Appendix G) with the district court. In the pretrial order, the plaintiff's claim against Deputy Hoy was still expressly based solely upon the Fifth and Fourteenth Amendments:

> "I. NATURE OF THE ACTION:
>
> This is an action at law brought pursuant to 42 U.S.C. 1983 for money damages to redress the deprivation of Plaintiff's rights, privileges and immunities, as secured by the **Fifth** and **Fourteenth** Amendments of the United States Constitution, caused by Defendants use of excessive force on Plaintiff, and their battery of him. . . ." (emphasis supplied) (App-34)
>
> . . . .
>
> "CLAIM ONE
>
> . . . .
>
> (c) Defendant Hoy's actions resulted in Plaintiff being deprived of his liberty without due process in contravention of the **fifth** and **fourteenth**

> amendment of the Untied States Constitution; . . . " (emphasis supplied) (App-37)

The plaintiff's claim against Douglas County was changed from a negligent standard of care as alleged in his amended complaint, to a "grossly negligent" standard of care:

> "(b) The Douglas County Sheriff's Office and Douglas County policy or custom to not provide Sheriff's Officers with adequate training in the use of deadly force was a gross deviation from accepted law enforcement procedures and constituted grossly negligent conduct towards the public in general and this Plaintiff in particular; . . . ." (App-40)

Not once in any of the allegations of the complaint, amended complaint, or the pretrial order is there a reference or mention of the Fourth Amendment, or the language of the Fourth Amendment; nor is there any contention in any of these documents, whatsoever, that an unlawful seizure of the plaintiff took place.

The trial of the case commenced before a jury on October 6, 1987. The case was tried on the constitutional amendments requested by the plaintiff; namely, an alleged violation of the Fifth and Fourteenth Amendments. At no time did the plaintiff ever assert the Fourth Amendment as a basis for recovery; and at no time did the plaintiff ever request the trial court to try the case on the basis of the Fourth Amendment. On the contrary, the plaintiff expressly represented to the court and the petitioners that his case was based upon "substantive due process," and that a negligent standard of care was not the standard of care applicable to his case; rather the standard he was asserting at trial was "intentional, unjustified, brutal, and offensive to human dignity." (App-48-49)

In the plaintiff's trial memorandum (set forth as Appendix H) submitted to the trial court at the commencement of the trial, the plaintiff expressly informed the court of his legal theory and basis for recovery as follows:

> "3. Plaintiff's Contentions of Law:
>
> A. Defendant Hoy's use of Excessive Force.
>
> Plaintiff has alleged that he was deprived of **substantive due process** as guaranteed by the **Fourteenth** Amendment by Officer Hoy on August 18, 1984.
>
> . . . .
>
> In the case before the Court Plaintiff alleges that he has been deprived of **substantive due process**. *See Rochin v. California,* 342 U.S. 165, 72 S Ct. 205, 96 L.Ed 183 (1952). . . ." (emphasis supplied) (App-48).
>
> "The Ninth Circuit in *Meredith v. State of Arizona,* 523 F.2d 481 (9th Cir. 1975) held that conduct under color of state law that can be fairly characterized as **intentional, unjustified, brutal and offensive** to human dignity violates the victims right to substantive due process.
>
> In the instant claim Plaintiff has alleged that he was shot in the chest for a distance of between six and eight feet by deputy Officer Hoy. Such conduct was "**intentional, unjustified, brutal and offensive to human dignity**". . . . ." (App-48) (emphasis supplied)

During the trial, the defendants moved for a directed verdict as to both of the plaintiff's claims. The plaintiff filed a "Memorandum in Opposition to Directed Verdict." (set forth as Appendix I.)

In the memorandum, the plaintiff once again expressly informed the trial court and the defendants that he was

relying exclusively on the Due Process Clause of the Fourteenth Amendment as his basis for recovery against Deputy Hoy, and that his claim was based upon a violation of "substantive due process." The plaintiff **agreed** (App-60) that proof of negligence (the standard actually set forth in the Fourth Amendment) was not the standard of care that governed **his** case; rather, the standard set forth in *Rutherford v. City of Berkeley,* 780 F.2d 1444 (9th Cir. 1986) was to be used by the court in evaluating his case and evidence (i.e. that defendants conduct was intentional, unjustified, brutal and offensive to human dignity.). (App-61) The plaintiff then argued as follows:

> ". . . Evidence has been presented that Defendant acted intentionally and that the shooting was unjustified. The jury could further find based on the evidence produced that the officer's use of deadly force in a situation where it was clearly unwarranted constituted **brutal conduct and was offensive to human dignity**. . . . In short if the conduct is so unreasonable that it **'shocks the conscience', a deprivation of an individual's constitutional right must be found.** Given the evidence before the jury of Defendant Hoy's lack of knowledge if he was at the right house and the myriad of options short of shooting the Plaintiff available to him a jury could conclude that his actions **'shocked the conscience'** and **constituted more than mere negligence.**" (emphasis supplied) (App-61-62)

Because the plaintiff agreed that the standard of care controlling his case against Deputy Hoy was that of the case law governing a violation of "substantive due process," the trial court instructed the jury pursuant to that standard. In fact, the first question submitted to the jury in the special verdict

form used the identical language argued by the plaintiff as controlling; that is, the jury was asked if "the plaintiff Robert Reed" was "subjected to intentional, unjustified, unprovoked, and brutal conduct by defendant Daniel Hoy." (App-22)

As to the claim against Douglas County, at trial it was the defendants' contention that the standard of care applicable to plaintiff's claim against Douglas County for its alleged failure to train Deputy Hoy was that of deliberate indifference, the same standard that this Court adopted after the trial of the case at bar in *City of Canton v. Harris*, 109 S.Ct. 1197 (1989). The plaintiff argued that the standard was that of "gross negligence." The trial court submitted the claim to the jury on the standard of "gross negligence."

The jury found, pursuant to a special verdict, that Deputy Hoy did not violate the Fourteenth Amendment. Because no constitutional violation was found to have occurred, the jury did not reach the failure to train claim against the County.

The plaintiff then appealed the judgment entered on the jury's verdict. In his brief (set forth as Appendix J) filed with the Court of Appeals on July 12, 1988, the plaintiff argued that the trial court had erred in three ways.

First, the plaintiff argued that "Magistrate Hogan's use of the word 'defendants' in his charge to the jury was both misleading and a misstatement of the law." (App-75)

Second, the plaintiff argued that "Magistrate Hogan erred in failing to give the plaintiff's requested jury instruction pertaining to an officer's duty to retreat prior to using deadly force." (App-80)

Finally, the plaintiff argued that "Magistrate Hogan's admission into evidence of testimony regarding the plaintiff's possession of marijuana was an abuse of discretion prejudicing plaintiff's case." (App-81)

Nowhere in plaintiff's brief was there an argument or an assignment of error that the trial court erred because (1) it failed to try the case on the basis of the Fourth Amendment, or (2) it failed to instruct the jury on the standard of care and language of the Fourth Amendment, or (3) the trial court erred in failing to give plaintiff's requested jury instruction on negligence, or (4) that the trial court instructed the jury on the wrong standard of care applicable to a claim based upon "substantive due process." The plaintiff could not make such assignments of error, because his requested standard of care and the language that defined such standard of care was used by the trial court in the verdict form.

To this very day, the plaintiff has not filed one document with **any** court that mentions, even once, the words "Fourth Amendment" or the words "unreasonable seizure." Furthermore, to this very day, the plaintiff has **never** filed one document requesting **any** court to base any of his claims on the Fourth Amendment; nor has the plaintiff **ever** requested any trial or appellate court to remand his case for trial on the standard set forth in the Fourth Amendment. He tried his case on the legal theory of "substantive due process," and he has never objected or complained of that decision.

Because the issue of the applicability of the Fourth Amendment to this case was never raised by the plaintiff at trial or on appeal, the defendants have never briefed the issues

resulting in the reversal of the judgment entered in their favor; and up to this date, those issues have never been briefed by any of the parties to this litigation. The only time the petitioners have had the opportunity to object to any of the issues set forth in the opinion of the Ninth Circuit was at oral argument, when the three-judge panel inquired into the possible application of the *Graham* decision to this case.

Although the Fourth Amendment and its application to this case was not briefed or raised by any of the parties, the Ninth Circuit reversed the judgment entered in favor of the defendants, holding that the trial court should have instructed the jury on the standard of care of the Fourth Amendment, as articulated by this Court in *Graham v. Connor, supra.*, even though *Graham* was decided after the trial of the case at bar; and even though years before the jury trial of this case, this Court and the Ninth Circuit had expressly held that a claim of excessive force could be based upon the Fourth Amendment, if a plaintiff so desired.

After the Ninth Circuit's initial decision, the defendants petitioned the Ninth Circuit for a rehearing, with the suggestion that the matter be heard en banc. The Ninth Circuit denied the petition for rehearing, but did amend its opinion as to the claim against Douglas County, holding that "While the County provided evidence of significant training, Reed also submitted expert testimony that the County's program was far below national standards;" and thus, the court concluded that even as to Douglas County, the matter had to be remanded for trial.

REASONS FOR GRANTING THE WRIT.

1. The Court needs to clarify the standard for submitting a claim of inadequate training to the jury.

Just how much training does a county have to provide to its officers, before it can safely avoid a jury trial on a claim of inadequate training?

In reversing the judgment entered in favor of Douglas County, the Ninth Circuit held that the trial court was correct in denying Douglas County's motion for directed verdict, because the plaintiff has introduced sufficient evidence of "gross negligence" on the part of Douglas County in its training of Deputy Hoy.

The Ninth Circuit acknowledged the numerous hours of training on the use of a firearm provided to Deputy Hoy at the expense of Douglas County; but held that because an expert testified that Douglas County's training program was far below the national standard, a jury question existed.

The plaintiff's evidence at trial of inadequate training was the testimony of plaintiff's expert, Donald VanBlaricom, a former Police of Chief of the City of Bellevue, Washington. It is the petitioners' position that Mr. VanBlaricom never did properly testify that Douglas County's training program was inadequate; and at most, one could only argue that he implied that based upon his review of the training records of Deputy Hoy, the training of Deputy Hoy was below industry standards.

On cross-examination, Mr. VanBlaricom admitted that he had no evidence of even one complaint from a citizen against

Douglas County for the use of excessive force between 1975 and 1984; and that he had no evidence of even one complain from a citizen that a Douglas County Deputy used deadly force, during the same time period. (RT at 335). On the other hand, Mr. VanBlaricom admitted that while he was the Chief of Police for the City of Bellevue, he received an average of four or five citizens complaint per year. (RT at 335).

This Court has adopted the "deliberate indifference" standard for application to failure to train cases against municipalities. In articulating the evidence required to meet this standard, this Court stated as follows:

> "That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program. . . . It may be, for example, that an otherwise sound program has occasionally been negligently administered. Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal. And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.
>
> Moreover, for liability to attach in this circumstance the identified deficiency in a city's training program must be closely related to the ultimate injury. Thus in the case at hand, respondent must still prove that the deficiency in training actually caused the police officers' indifference to her medical needs. Would the injury have been avoided had the employee been

> trained under a program that was not deficient in the identified respect? . . ." 109 S.Ct. at 1206.

The Ninth Circuit's holding in the case at bar does not comply with this Court's holdings in *City of Canton*; or *Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985); and in effect means that in every case in which a plaintiff contends that a municipality inadequately trained its officers, that case must be submitted to the jury if there is testimony from an expert, regardless of the amount of hours of training provided to the officers, and regardless of the fact that for a ten-year period prior to the incident, the municipality had no citizens' complaints against it and no prior instances of alleged excessive force. In actuality, this means that every case will go to trial and to the jury.

An example of the correct application of this Court's holding in *City of Canton* is the case of *Lewis v. City of Irvine, Ky*, 899 F.2d 451 (1990). As stated in *Lewis*,:

> "In this case, the uncontroverted evidence established that Officer Miller, who had years of experience before joining the Irvine police force, received extensive training over the course of his career. Whether that training was the best and most comprehensive available has no bearing on the plaintiffs' failure to train claim. *See id.* at ___, 109 S.Ct. at 1206. On the evidence presented in this case, reasonable jurors could only conclude that the City of Irvine's failure to train Officer Miller did not rise to the level of deliberate indifference."

The importance of this Court further defining the type of cases to be submitted to the jury in failure to train cases cannot be overstated. Lawsuits against municipalities are on the rise, and the expenses associated with defending them is tremendous. The *City of Canton* decision is new, and the

district and circuit courts will be applying the standard immediately. An early refinement of the type of evidence needed to "get" to the jury from this Court will greatly enhance judicial economy in the treatment of failure to train cases.

2. The Court needs to articulate when the retroactive application of *Graham* is proper.

This Court should make the final determination when, and under what circumstances, *Graham* should be applied retroactively, so that the various circuits applying *Graham* to cases tried before its decision reverse cases on a uniform basis. If the Ninth Circuit is correct, every case that has been tried prior to *Graham* will be reversed, if the jury was not instructed on the standard of care of the Fourth Amendment, regardless of the pleadings and issues raised at trial; and regardless of the state of the case law in the particular circuit prior to *Graham*.

It is the petitioners' position that in those circuits that recognized that excessive force cases could be based upon the Fourth Amendment prior to *Graham*, *Graham* should only be retroactively applied to those cases in which the plaintiff pled a claim for relief based upon the Fourth Amendment. This would then be consistent with the rule of law that only those legal theories advanced at trial are to be reviewed by an appellate court. Such a holding would also prevent a "sandbaging" of both trial judges and defendants that tried the case upon the legal theories asserted at trial by a plaintiff.

The rule of law that the Fourth Amendment could be the basis of an excessive force case was well established in the Ninth Circuit and this Court prior to the plaintiff filing his

amended complaint, prior to the lodging of the pretrial order, and prior to the trial of this case. *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) (plaintiff pled a violation of the Fourth, Fifth, Sixth, Eighth, and the Fourteenth Amendment as a legal basis for recovery.) *McKenzie v. Lamb*, 738 F.2d 1005 (9th Cir 1984); *Robins v. Harum*, 773 F.2d 1004 (9th Cir. 1985) (plaintiff alleged a violation of the First, Fourth, Fifth, and Fourteenth Amendments.); *White By White v. Pierce County*, 797 F.2d 812 (9th Cir. 1986); *Soto v. City of Sacramento*, 567 F.Supp. 662 (1983).

As stated in *Soto* in the Ninth Circuit as early as 1983:

> ". . . Thus, if the application of excessive force is 'unreasonable' within the meaning of the Fourth Amendment, a constitutional violation occurs. . . . The rationale for this assertion is succinctly articulated by the Fourth Circuit in *Jenkins v. Averett*, 424 F.2d 1228, 1231-32 (4th Cir. 1970) . . . ." 567 F.Supp at 671.

As stated by the Ninth Circuit in 1985 in *Robins v. Harum* :

> "A section 1983 claim based on a violation of the Fourth Amendment **is on solid ground in this circuit.** This court has held that a section 1983 claim may be based upon the Fourth Amendment where the police use excessive force during arrest procedures." 773 F.2d at 1008. (emphasis supplied)

As stated in 1985 by this Court in Tennessee *v. Garner*, *supra*, at 105 S.Ct. 1699:

> "[t]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."

Justice Blackmun in *Graham* recognized the need for an assertion of the Fourth Amendment before reversal is to be allowed:

> "[In] light of respondents' concession, however, that the pleadings in this case properly may be construed as raising a Fourth Amendment claim, see Brief for Respondents 3, I see no reason for the Court to find it necessary further to reach out to decide that pre-arrest excessive force claims are to be analyzed under the Fourth Amendment *rather than* under a substantive due process standard. . . .
>
> In this case, petitioner apparently decided that it was in his best interest to disavow the continued applicability of substantive due process analysis as an alternative basis for recovery in pre-arrest excessive force cases. . . ." 109 S.Ct. at 1873-74

In *Graham*, the plaintiff presented his case on the basis of the Fourth Amendment. In the case at bar, the plaintiff decided that it was in his best interest to base his claim for relief exclusively on the Due Process Clauses of the Fifth and Fourteenth Amendment, instead of the Fourth Amendment, or a combination of all three. It was also his decision not to assert any common law pendent state law claims, such as negligence or assault. The plaintiff expressly articulated the Amendments he was relying upon, none of which included the Fourth. The plaintiff had this right to choose his legal theories; it is not the role of courts to "force" legal theories upon plaintiffs, after trial to "help" them out.

If it is the opinion of this Court that there is no legal basis for recovery allowable under the Due Process Clause of the Fourteenth Amendment in pre-arrest excessive force cases, then this court should affirm the judgment entered in favor of

the defendants for that reason. If a plaintiff asserts a legal theory that does not allow recovery, the legal theory should be dismissed. It is not the court's function to find an available legal theory for a plaintiff, and then reverse the matter for trial on that available legal theory.

The situation is not any different than the situation where a person is injured by a defective product, and the plaintiff has available the legal theories of negligence and strict liability in tort. If the plaintiff only pleads the strict liability theory, and the appellate court decides that such a theory is no longer available to the plaintiff, the proper procedure is to dismiss the action, not reverse it, and remand it for a retrial on the theory of negligence.

In the case at bar, the plaintiff decided that it was in his best interest to present his case against Hoy on one legal theory, and has since that date, not contended otherwise; nor has he asked any court to apply the Fourth Amendment to his case. The trial court instructed the jury on the correct standard of care required by the Due Process Clause of the Fourteenth Amendment as established by the case law of the Ninth Circuit. The reason the trial court did not instruct the jury on the legal standard set by the Fourth Amendment was the same reason the court did not instruct the jury on the legal standards of common law negligence, common law battery, or common law assault; none of those alternative legal theories were pled or asserted by the plaintiff.

Defendants respectively submit that cases are not tried or reversed on appeal for claims and legal theories that might

have been pled or asserted; but rather, cases are tried and reversed on appeal for claims that are pled and asserted at trial. Under the circumstances of the case at bar, *Graham* should not be allowed to the basis for reversing Deputy Hoy's judgment.

3. This Court needs to advise the lower courts whether *Graham* completely precludes a plaintiff from recovering on a substantive due process standard in pre-arrest excessive force cases.

In the case at bar, the Ninth Circuit held that because the Fourth Amendment applied to the facts of the case, the plaintiff could not base recovery on a substantive due process standard. The Ninth Circuit relied upon the language set forth by this Court in *Graham*.

Graham was not a substantive due process case; whereas the case at bar is such a case. This Court now has the opportunity to advise the lower courts as to whether *Graham* precludes substantive due process cases in pre-arrest excessive force situations. It is the petitioners' position that there is no reason why a substantive due process standard can not be an alternative basis for recovery in pre-arrest excessive force cases, especially where a plaintiff is trying to collect punitive damages, an item of damages that would not be allowable upon mere proof of a Fourth Amendment violation; but would be allowable upon proof of a substantive due process violation.

4. Did a Fourth Amendment seizure take place in this case, and if so, was Deputy Hoy's conduct objectively reasonable as a matter of law.

In the situation where a police officer uses force to stop or arrest a person, there is little difficulty in concluding that a

Fourth Amendment seizure took place. However, when an officer is backing away from a person, and only uses force to stop the person from killing him, it is not clear that the Fourth Amendment is even applicable.

The question presented to this Court is whether a Fourth Amendment seizure takes place where a police officer uses force in self defense; and upon proof that the officer was not attempting to detain or arrest a person, but was actually backing away. It is the petitioners' position that because all citizens are entitled to defend themselves from being killed, a Fourth Amendment seizure does not take place simply because the person defending himself happens to be a police officer. Before the Fourth Amendment should be applied to a police officer that uses force, there should be a requirement that it must first be found that the officer was attempting to detain or arrest a person prior to any use of force. If the force is used in self defense after the officer attempted to detain or arrest the person, the Fourth Amendment would apply; but not otherwise.

Furthermore, it is the petitioners' position that even if a Fourth Amendment seizure took place in the case at bar, Deputy Hoy's conduct was, as a matter of law, objectively reasonable.

It is undisputed that the plaintiff was within six feet of Deputy Hoy with a splitting maul, and that he had refused to stop or put down the maul. Under such circumstances, Deputy Hoy was justified in shooting the plaintiff, just as one of us would have been justified in shooting a person advancing on us with a splitting maul.

5. Is it still the rule of law in federal court that a party that does not assert his basis for recovery at trial and on appeal will be deemed to have waived any basis not so asserted?

As already evident, nowhere in the pleadings, pretrial order, or trial memorandums submitted with the trial court did the plaintiff ever request his case to include the Fourth Amendment as a legal basis for recovery. Furthermore, the plaintiff did not raise the issue on appeal.

The Ninth Circuit completely ignored these important facts, and on its own, held that the plaintiff properly raised the issue of the Fourth Amendment, because the plaintiff submitted "Plaintiff's Requested Jury Instruction Number 8" (set forth as appendix K).

First, it is important to note that jury instruction number 8 is an incorrect statement of the law; and even if the Fourth Amendment applies to this case, the trial court would not have erred in refusing to give it. In addition to not correctly stating the proper standard of the Fourth Amendment, the instruction instructs the jury to find in favor of the plaintiff, if it found Deputy Hoy negligent. This is not accurate, since Deputy Hoy could have been found negligent; but not liable because of his defense of qualified immunity.

Second, the plaintiff cited two cases below the requested jury instruction; neither of which support the language of the instruction. In addition, no Fourth Amendment excessive force cases such as *Tennessee v. Garner, supra*; *Robins v. Harum, supra*; or *Soto v. City of Sacramento, supra*, were cited in support of the instruction.

Third, the requested jury instruction must be read in light of the other documents submitted by the plaintiff to the trial court. A trial court judge is only required to instruct the jury on the legal standards applicable to the legal theory which forms the basis of the plaintiff's lawsuit.

On October 1, 1987, five days before trial, the plaintiff submitted his requested jury instructions, one of which included jury instruction number 8. Subsequent to the submission of his jury instructions, the plaintiff submitted the two trial memorandums discussed above, in which he expressly stated that his claim was based upon "substantive due process." As already discussed, in his trial memorandums, the plaintiff even went so far as to advise the court of the correct language of the standard of his substantive due process claim, and agreed that a negligent standard of care was not applicable. In other words, prior to the jury being instructed, the plaintiff advised the trial court in writing that the standard of care applicable to his case was different from the standard of care set forth in jury instruction number 8.

It is also significant to note that in his trial memorandums, the plaintiff cites this Court's decision of *Tennessee v. Garner*, but not for the proposition that the Fourth Amendment standard of care set forth in *Garner* applied to his lawsuit, but rather, for the proposition that a shooting justified under state law can still be held to be unconstitutional. (App. at 52, 63).

Thus, this is not a case where the plaintiff was unaware of the legal authority allowing him to base his claim upon the Fourth Amendment; rather, it is a case where the plaintiff knew of legal authority allowing him to base his claim upon

the Fourth Amendment, but expressly elected to use a substantive due process standard instead. It is just the opposite situation presented to this Court in *Graham*, where the plaintiff's attorney elected to go exclusively with the Fourth Amendment, and not pursue a substantive due process claim.

In light of the fact that the plaintiff expressly told the court that his case was a substantive due process claim, jury instruction number 8 simply was not applicable.

Finally, the simple fact remains that the plaintiff has never contended that the Fourth Amendment applies to his case. Without such an assertion, the Ninth Circuit was without authority to remand the case for trial on the Fourth Amendment. As stated by the Ninth Circuit in *Eberle v. City of Anaheim*, 901 F.2d 814, 817 (9th Cir. 1990):

> "Kiser contends he was arrested and ejected from the stadium because he had been cheering for his team and otherwise exercising his first amendment right of free speech. Therefore, he argues, his seizure violated the federal Constitution. Kiser asserts there was substantial evidence before the jury on this theory of his case and there was insufficient evidence to the contrary to support the verdict in favor of the officers.
>
> The threshold problem with this argument is that Kiser did not include his first amendment claim, or any issue pertaining to it, in the initial pretrial order. Almost three years after the pretrial order was entered, and just fifteen days before trial, Kiser sought to add the theretofore omitted first amendment issue. The district court denied Kiser's motion to amend. Thus, the issue Kiser would have us consider is not set forth in the pretrial order. Accordingly, Kiser was precluded from offering evidence on this issue, or otherwise advancing this theory of recovery, during the trial.

Northwest Acceptance Corp. v. Lynnwood Equip., Inc., 841 F.2d 918, 924 (9th Cir.1988); *United States v. First Nat'l Bank*, 652 F.2d 882, 886 (9th Cir.1981). Because the issue was not before the trial court, we will not rule on it on appeal. *Ferris v. Santa Clara County*, 891 F.2d 715, 719 (9th Cir.1989).

In his reply brief, Kiser focuses his attack on the pretrial order itself. He contends the district court abused its discretion by refusing to permit him to amend the pretrial order to include the first amendment issue. Without expressing any opinion on the merits of this argument, we note it is probably the argument Kiser should make; but it comes too late. Kiser did not raise the argument in his opening brief. Indeed, in his opening brief he neither mentions the pretrial order nor the district court's denial of his motion to amend it. The first time the argument pops up is in Kiser's reply brief.

It is well established in this circuit that ' "[t]he general rule is that appellants cannot raise a new issue for the first time in their reply briefs." ' " *Northwest Acceptance Corp.*, 841 F.2d at 924 (quoting *United States v. Birtle*, 792 F.2d 846, 848 (9th Cir.1986)). We could consider the issue had appellees raised it in their brief. *Ellingson v. Burlington N., Inc.*, 653 F.2d 1327,1332 (9th Cir.1981). But appellees merely noted that Kiser had failed to raise the issue. Such an observation does not constitute raising the issue. *Id.* We could also "consider the issue [if] the appellee has not been misled and the issue has been fully explored." *Id.* (citation omitted). This, however, is not the case. The issue has not been fully explored. Accordingly, we hold that the issue has been waived. *See id*

CONCLUSION

As far as petitioners know, this will be the first case presented to this Court for a determination as to whether there can ever be a claim based upon a substantive due process standard in pre-arrest excessive force cases. The case at bar

also involves issues that will help clarify this Court's prior holdings in such areas as a municipality's liability for a failure to train its officers; whether the use of force in self defense constitutes a seizure as that term is use in the Fourth Amendment; and what type of conduct amounts to "objectively reasonable" conduct. Finally, the case at bar raises the issue of whether an appellate court can remand a case on a legal theory not raised or asserted at trial, or on appeal. For the reasons set forth above, the Court should issue a writ of certiorari to review the judgment and decision of the Ninth Circuit Court of Appeals in the case at bar.

Respectfully submitted,

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Petitioners